United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1064

To be submitted

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1064

UNITED STATES OF AMERICA,
Appellee,

—v.—

NORMAN BURTON,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

DANIEL J. BELLER,
LAWRENCE S. FELD,
Assistant United States Attorneys, Of Counsel.

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Preliminary Statement

Norman Burton appeals from a judgment of conviction entered on February 14, 1975, in the United States District Court for the Southern District of New York, after a three-day trial before the Honorable Harold R. Tyler, Jr., United States District Judge, and a jury.

Indictment 74 Cr. 737, filed in two counts on July 26, 1974, charged Burton with distributing and possessing with intent to distribute approximately an eighth of a kilo of cocaine on two occasions, in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A), and Title 18, United States Code, Section 2.

Trial commenced on December 16, 1974 and concluded on December 18, 1974, when the jury returned a verdict of guilty on both counts. On February 14, 1975, Burton

was sentenced to concurrent terms of imprisonment of three years and six months, to be followed by a three year term of special parole. Burton is free on bail pending appeal.

Statement of Facts

The Government's Case

The Government's proof at trial established that Norman Burton sold one-eighth kilo quantities of cocaine to undercover detective Dorothy Johnson on May 29 and July 15, 1974, as charged in the indictment.

The evidence at trial disclosed that in August, 1972, Marion Ladd, a woman with extensive contacts in the New York drug trafficking community, began cooperating with the federal government.

On April 25, 1974, Marion Ladd introduced Detective Johnson to Norman Burton in his apartment at 300 West 55th Street, in New York City (Tr. 37, 97). Burton and Ladd spoke about people they knew in common. Burton spoke generally about cocaine and the fact that he had only the best (Tr. 97). Burton stated that he could obtain cocaine and that the price would be between $3,800 and $4,200 an ounce (Tr. 40). Detective Johnson stated she wanted to purchase an eighth of a kilo. Burton told Mrs. Ladd to contact him at a later time (Tr. 41).

Thereafter Ladd spoke to Burton several times on the telephone. On the evening of May 8, 1974, Burton told Ladd that his "aunt had come by" and that Ladd and Johnson should come to see him. At the apartment Burton, suspicious of Detective Johnson, questioned her as to people she had dealt with in the past. Detective Johnson advised Burton that she had in fact met him a year earlier in connection with another narcotics transaction. Shortly thereafter, a friend of Burton's named "Shepappy" ar-

rived at the apartment. "Shepappy" also recognized Detective Johnson in her undercover capacity from a previous meeting in a bar. This information appeared to put Burton at ease (Tr. 41-44, 98-100).

After a while Burton went into the kitchen and asked Detective Johnson to accompany him. Burton told Johnson he could get her an eighth of a kilo of cocaine, that he was not yet sure of the price but that Mrs. Ladd would let her know. Ladd and Johnson left the apartment.

Thereafter, at the beginning of the Memorial Day weekend, Ladd received a call from Burton. Burton said he had a package for Detective Johnson. Ladd was unable to reach Detective Johnson who was away for the weekend and so informed Burton. Burton, nevertheless, told Ladd to come to his apartment (Tr. 46-47).

When Ladd arrived at Burton's apartment Burton told the woman who was there to leave. She returned in fifteen or twenty minutes with a sealed plastic bag of cocaine which she gave to Burton. Burton opened the bag and strained it to show Ladd that there were "rocks", or crystals, in it, a supposed sign of purity. Burton told Ladd he wanted Johnson to pick up the package as soon as possible and authorized Ladd to give Johnson his telephone number. Ladd saw Detective Johnson the following Tuesday, May 28, 1974, and told her what had happened (Tr. 45-49).

On May 28, Detective Johnson telephoned Burton who told her to come up to his apartment.* She did so, accompanied by members of her Task Force group who conducted surveillance outside Burton's apartment building. In his apartment, Burton told Johnson he had the package for her but that his "boy," Ron, would have to

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* A tape of this conversation was received in evidence and played for the jury (GX 1; Tr. 104-111).

bring it over. Johnson stated that she had to park her car and left the apartment. After conferring with the surveillance team Johnson returned to the apartment. Burton appeared agitated. He stated that Marion Ladd had called as had a mutual friend named Doris King. Both seemed to know that Johnson was there to make a buy and Burton had been told not to sell to Detective Johnson. At that moment Doris King called again and told Burton not to sell to Detective Johnson. Burton told Johnson he would not go through with the sale and that she should return the following evening. (Tr. 111-117).

The following day, May 29, 1974, Johnson called Burton twice and arranged to meet Burton at his apartment.* She went to his apartment and again Burton spoke of his fears of selling cocaine to Johnson. Eventually, Burton sent Ron to get the package. When he failed to return after a considerable period of time Detective Johnson said she was leaving and would call Burton later in the evening. She left at approximately 10:30 P.M. and joined the surveillance group outside the apartment building. At midnight she telephoned Burton who told her to return. She waited in the apartment for fifteen or twenty minutes until Ron returned. Burton then came into the room and began straining the cocaine through three strainers.** Burton put the cocaine in a plastic bag, and weighed the contents. Detective Johnson then gave Burton $4,200 in exchange for the cocaine (Tr. 124-132; GX 7).

Detective Johnson telephoned Burton several times after the May 29th transaction. On July 14, 1974, Burton told her to come to his apartment the following day. She did so in the afternoon and was told to return in the

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* Tape recordings of these conversations were admitted in evidence and played for the jury (GX 2, 3).

** Three strainers were seized from Burton's apartment pursuant to a search warrant and received in evidence (GX 4, 5, 6).

evening. When she returned at approximately 6 P.M., Burton took out a plastic bag of cocaine and again strained it. He replaced the cocaine in a plastic bag, gave it to Detective Johnson and received $4,200 from her in exchange. After a short conversation she left (Tr. 136-142; GX 8).*

The Defense Case

The defense presented the testimony of Denise Heyward, a caseworker with the Department of Social Services. She said she presently lived in Freeport, Long Island, but that she had lived with Burton from April 1972 to January 1973 in Manhattan. She testified that she saw Detective Johnson in Burton's apartment in September or October, 1972, and was told at that time that Johnson was a policewoman.**

On cross-examination Miss Heyward admitted that the Freeport address she had given was her mother's address. She stated that her work in New York often required her to stay late and to sleep in town. When she did so she would stay with Burton.

The defendant testified in his own behalf. He denied any involvement in narcotic transactions, claiming that his income derived from real estate he owned in Brooklyn. Burton testified that he could not have had the telephone conversation with Dorothy Johnson or made a sale of

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* In addition to Marion Ladd and Dorothy Johnson, the Government called two DEA Chemists who testified that the powder sold by Burton was cocaine. Task Force Officers Rawald, Rose and Marrero, testified as to surveillance activities on April 25, May 8, May 28 and 29, and July 15, 1974. Agent Rose also testified concerning a search of Burton's apartment on July 17, 1974 and identified certain materials seized from the apartment, and offered in evidence, including "The Gourmet Cokebook" (GX 17).

** This testimony was offered to bolster the defense theory that Detective Johnson had had an affair with Burton in 1972 and, as a woman spurned, was testifying against him from motives of revenge.

cocaine on May 29 because on that date he personally delivered a certified check to Sackman and Gilliland Corporation, Garden City, Long Island, as partial payment on the mortgage for his Brooklyn property (DX F). Burton testified that he discussed the matter with Mr. Doyle of that firm (Tr. 356-358).

The Government's Rebuttal Case

In rebuttal the Government called Edward Doyle of Sackman and Gilliland. Doyle testified that the check brought by Burton in May, 1974, was certified on May 30, 1974, and therefore could not have been received by Doyle on May 29. His own recollection was that the check was received either May 31 or June 1, 1974 (Tr. 444-448).

ARGUMENT

POINT I

There was no error in referring to the defendant by his alias "Big Time" either in the indictment or at trial.

Burton argues that he was denied a fair trial because he was referred to in the indictment and during the course of the trial by his nickname "Big Time." Since the proof at trial established that Burton was known to his associates as "Time" or "Big Time," it was not error to refer to him in that fashion.

The use of an alias in an indictment is proper where the evidence reflects that the defendant used such a name. *United States* v. *Skolek*, 474 F.2d 582, 586 (10th Cir. 1973); *United States* v. *Wilkerson*, 456 F.2d 57, 59 (6th Cir.), *cert. denied* as *Gray* v. *United States*, 408 U.S. 926 (1972); *United States* v. *Claytor*, 52 F.R.D. 360, 361

(S.D.N.Y. 1971); *United States* v. *Machi*, 324 F. Supp. 153, 155 (E.D. Wis. 1971); *United States* v. *Addonizio*, 313 F. Supp. 486, 491 (D. N.J. 1970), *aff'd*, 451 F.2d 49 (3d Cir. 1971), *cert. denied*, 405 U.S. 936 (1972); *United States* v. *Johnson*, 298 F. Supp. 58, 65-66 (N.D. Ill. 1969). In any event, Burton never asked the court to strike the alias "Big Time" from the indictment and is therefore precluded from raising the issue on this appeal. Fed. R. Crim. P. 12(b)(2).

Testimony at the trial clearly indicated that associates of Burton referred to him exclusively by his nickname. Marion Ladd identified Burton at trial but she stated she knew him as "Big Time" (Tr. 33). The reference was significant in view of the fact that two of the three recorded telephone conversations between Burton and Detective Johnson played for the jury show Johnson asking to speak to "Time" (GX 2, 3). After a pause a man's voice could be heard on the phone. The Government argued that the voice was Burton's despite Burton's insistence that he could not have been a party to the May 29th phone call because he was not at home on that date. The identification of Burton as "Time" in the prior testimony was relevant to show that it was in fact Burton's voice on the tape.*

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* When defense counsel did object at trial to the prosecutor's use of the nickname, the district court overruled the objection stating, "I gather from what I have heard so far that he was called that in conversation. I see absolutely no prejudice to Mr. Burton at all. A great many of us have nicknames . . . ." (Tr. 137). The court's ruling served as a curative instruction to the jury not to treat the use of the alias as anything but a nickname. In any event, in view of the overwhelming evidence of guilt, any error in the use of an alias at trial was harmless. *United States* v. *Wilkerson*, *supra* at 59; *United States* v. *Grayson*, 166 F.2d 867 (2d Cir. 1948); *United States* v. *Monroe*, 164 F.2d 471, 477 (2d Cir. 1947), *cert. denied*, — U.S. — (1948).

POINT II

The claims of reversible error in the offer of certain testimony at trial are without merit.

1. Protective Custody

At the close of the direct examination of Marion Ladd and after previously eliciting certain promises made by the Government to her in exchange for her cooperation, the witness was asked whether there had been a change in her status in July, 1974. The record reveals the following colloquy:

A. Yes, there was.
Q. What happened?
A. I was taken into protective custody of the Government.
Q. Which Government is that?
A. U.S. Government.
Q. Why was that?
MR. BOBICK: OBJECTION.
A. My life had been threatened.
THE COURT: Just a moment, I am going to sustain the objection. I don't think we need to get into the details on that.
Q. As part of that program, the protection program, were you moved to a new location?
A. Yes, I was.
Q. Out of New York.
A. Yes.
Q. And that was at the Government's expense, was it not?
A. Yes.
Q. Also as part of that program you were provided with room and board, is that correct,
A. Yes (Tr. 52-53).

When the objected to testimony is placed in its proper context, it is clear that the Government sought to show at the close of the witness' testimony the full extent of the benefits received by Mrs. Ladd in exchange for cooperation. The Government arguably had a duty to disclose to the defense the fact that the witness was in a federal program that paid for her relocation and for her room and board, *Cf. Brady* v. *Maryland*, 373 U.S. 83 (1963); *Giglio* v. *United States*, 405 U.S. 150 (1972). In any event, it was proper for the prosecution to develop this fact on direct examination in order to prevent the jury from thinking that the Government was hiding information, *United States* v. *Del Purgatorio*, 411 F.2d 84, 87 (2d Cir. 1969); *United States* v. *Rothman*, 463 F.2d 488, 490 (2d Cir.), *cert. denied*, 409 U.S. 956 (1972). The Government was entitled to show that these benefits were related to a real concern for the witness' safety and not gratuities designed to influence her testimony improperly.

In addition, the record seems clear that the answer upon which defendant now bases his appellate argument did not prejudice the defense at trial. In view of the fact that the witness testified she had developed between 20 and 25 cases for the Task Force (Tr. 32); it is highly unlikely the jury believed—and the Government never argued or implied—that it was Burton who had threatened the witness' life. See *United States* v. *Tramunti*, Dkt. No. 74-1550 (2d Cir., March 7, 1975), slip. op. 2107, at 2167-68. This analysis probably explains why defense counsel did not request that the answer be stricken and did not ask the court for a curative instruction after the witness said her life had been threatened and after the objection was sustained. The Government submits that any error in this regard was harmless beyond a reasonable doubt.

2. Prior Investigation

Undercover Detective Dorothy Johnson identified the defendant Norman Burton in the courtroom. When asked when she first met him she replied in March, 1973. The following colloquy occurred:

Q. Without going into the details, would you just explain to the jury the general circumstances of that first meeting?
A. Well, I went to the apartment. It was on an investigation that the Task Force had on Norman Burton.
Q. What sort of investigation was that?
A. It was a narcotics investigation (Tr. 94).

After objection and a motion for a mistrial, the court instructed the jury to disregard the testimony.

In view of the defense, the testimony was wholly proper. In his opening statement, defense counsel advised the jury he would prove that Dorothy Johnson had met Norman Burton in 1972 and that they had had an affair (Tr. 13). Later, defense counsel attempted to develop the theme that Burton and Detective Johnson had had sexual relations in 1972 and at least once in 1974, when Johnson testified she met Burton for the purchase of cocaine. During the cross-examination of Detective Johnson counsel went so far as to ask the following:

Q. . . . did there ever come a time when you got upset and removed your blouse and brassiere and other personal belongings?
A. Excuse me.
Q. Did you ever get upset and remove your blouse and your brassiere and your other clothes?
A. No.
Q. Never?
A. No.

Q. Did you at any time ever have sexual relations with the defendant Norman Burton?
A. No (Tr. 146-147).

Accordingly, the Government could properly rebut this defense claim by establishing that Detective Johnson had met Burton for the first time, not in 1972, but in 1973, and that her encounter with him at that time was strictly in the course of her official duties. *United States* v. *Papadakis*, 510 F.2d 287, 294 (2d Cir. 1975); *United States* v. *Nathan*, 476 F.2d 456, 459-60 (2d Cir.), *cert. denied*, 414 U.S. 823 (1973).

3. Admission of "The Gourmet Cokebook"

The Government offered in evidence a copy of "The Gourmet Cokebook" seized from the defendant's apartment pursuant to a search warrant. Burton now complains that admission of the book was prejudicial and without relevance to the charges.

Burton points to nothing in "The Gourmet Cokebook' that is inflammatory or prejudicial. It is firmly established that evidence of the possession of special means, such as books or apparatus, is admissible to show the doing of an act requiring those means. 1 Wigmore, *Evidence* §§ 88, 238 (3d ed. 1940) at 516; *United States* v. *Tramunti*, *supra* at 2134. Burton's possession of the book was relevant to show his interest in a subject which, coupled with the evidence at trial, tended to support the charges in the indictment. *United States* v. *La Froscia*, 485 F.2d 457, 459 (2d Cir. 1973). Moreover, on cross-examination Burton denied any interest in narcotics, stating that he avoided it at all times. His possession of the Gourmet Cokebook thus also served to impeach this testimony (Tr. 419).*

* On cross-examination, certain passages in the book were read to Burton. He admitted being familiar with some, if not all, of

[Footnote continued on following page]

POINT III

The prosecutor's comments in summation regarding the defendant's failure to call certain witnesses was not error.

In discussing the defense case during the course of his summation, the prosecutor commented on the failure of the defense to call witnesses to support the defense case. The court sustained an objection to this line of argument and directed the prosecutor to move on to something else (Tr. 495-496).

This was not a case where the defense called no witnesses or where the defendant failed to testify. In this case Burton testified, denied the charges against him and claimed that the women who testified against him were seeking revenge. He denied meeting Detective Johnson in March 1973 when, he said, he was in Florida. He claimed he could not have talked to Dorothy Johnson on May 29, 1974, because on that date he was at Sackman and Gilliland in Garden City. He explained that he kept lactose in his apartment because a doctor had prescribed lactose as a treatment for his ulcer condition. The defense also presented the testimony of Denise Heyward, whose testimony was offered to support the defense theory that Detective Johnson and Burton had been lovers in 1972.

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them. They related to the use of lactose as a "cut" for cocaine, and the test for purity by using a cut. This evidence was significant in that it tended to corroborate Marion Ladd who testified that Burton talked at length about the purity of the cocaine and the importance of a "cut" (Tr. 39-40). Moreover, the book supported the Government's contention that lactose found in Burton's apartment (GX 10, 11), was used as a cutting agent by him and not, as Burton testified, as a sugar substitute medically prescribed for his ailing ulcers (Tr. 422).

The Government was not required to remain silent in the face of this testimony. Since Burton was in no way resting on his Fifth Amendment right, it was fair comment by the prosecutor to ask why corroborative witnesses had not been called by the defense.* *United States* v. *Tramunti, supra,* at 2165-2166.

This Court has held "that remarks concerning lack of contradiction are forbidden only in the exceedingly rare case where the defendant alone could possibly contradict the government's testimony." *United States ex rel. Leak* v. *Follette,* 418 F.2d 1266, 1269 (2d Cir. 1969), *cert. denied,* 397 U.S. 1050 (1970); *United States* v. *DioGuardi,* 492 F.2d 70, 81-82 (2d Cir.), *cert. denied,* 43 U.S.L.W. 3212 (October 15, 1974). That close question is not presented here, since the Government was commenting not on the lack of contradiction—which calls into question the burden of proof—but on the incredibility of the defense case. Moreover, since the defendant testified, the prosecutor's remarks could not have constituted "a veiled comment on the defendant's" silence, *United States ex rel. Leak* v. *Follette, supra,* 418 F.2d at 1270. Any suggestion that the prosecutor's comments might have shifted the burden of proof would have been dispelled by the district court's charge on presumption of innocence and burden of proof (Tr. 504-505).

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* The idea that these witnesses were equally available to the Government is absurd. Neither Burton nor Miss Heyward disclosed the names of any other person who saw Detective Johnson and Burton together in 1972. Burton would not reveal the name of his New York doctors when asked on cross-examination, or of the names of his friends in Miami with whom he allegedly stayed in March 1973. The only corroborating witness whose name was disclosed was Mr. Doyle of Sackman and Gilliland. The Government called Mr. Doyle in rebuttal and his testimony gave the lie to Burton's claim that he was in Garden City on May 29, 1974.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

DANIEL J. BELLER,
LAWRENCE S. FELD,
Assistant United States Attorneys,
Of Counsel.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

David T. Bolan being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 19 day of May, 1975, he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

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And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

David T. Bolan

Sworn to before me this
19th day of May, 1975

Lawrence S. Feld

LAWRENCE S. FELD
Notary Public, State of New York
No. 31-0258952
Qualified in New York County
Commission Expires March 30, 1976